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IN THE

United States Supreme Court

HAROLD LEVINSON ASSOCIATES, INC.,
A Corporation, and EDWARD BERRO,
Individually and as President,

Petitioners,

v.

ELAINE L. CHAO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer that has provided extra compensation to its employees under the Fair Labor Standards Act, 29 U.S.C. § 207(h)(2), by paying a premium rate for overtime hours under 29 U.S.C. § 207(e)(5), (6) or (7) may offset its overpayment against any overtime owed under the Act in accordance with the terms of the Act and the Department of Labor Field Operations Handbook, regardless of whether the overtime liability arose in the same work week or work period as the overpayment, as the Courts of Appeals in the Eleventh and Federal Circuits have held, or whether the overpayment may be offset against overtime liability only when the overpayment was made in the same work week or work period that the overtime liability was incurred, as the Courts of Appeals in the Sixth and Seventh Circuits have held?

2. Whether the failure to permit an offset of extra compensation paid by an employer to its employees under the Act except when the extra compensation was paid in the same work week or work period that the overtime liability was incurred constitutes an enhanced penalty that is not authorized by statute?

3. Whether the Court can disregard the terms of a stipulation between the parties?

4. Whether the utilization of average overtime figures from a different period in the company's history, which are not annualized and are not adjusted either for the company's growth or the increase in the company's volume and sales is a violation of this Court's requirement that the Secretary's calculation of

unpaid overtime must be "a matter of just and reasonable inference"?

PARTIES TO THE PROCEEDING

Petitioner Harold Levinson Associates, Inc. ("HLA") is a wholesaler and distributor of goods, primarily tobacco products, to convenience stores. Petitioner Edward Berro ("Berro") is the President of HLA.

Respondent Elaine L. Chao is the Secretary of the United States Department of Labor. The Honorable Elaine L. Chao was substituted for her predecessor, the Honorable Alexis M. Herman, during the appellate proceedings pursuant to Fed. R. App. P. 43 (c)(2). Respondent commenced this action against HLA and Berro alleging violations of the Fair Labor Standards Act.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

HLA is a privately owned corporation with its principal place of business in Farmingdale, New York. It has no parent corporation and no publicly held company owns 10% or more of the stock in HLA.

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OPINIONS BELOW

Petitioners Harold Levinson Associates, Inc. and Edward Berro respectfully petition for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit, reported at 121 Fed. Appx. 918, 2005 WL 428787 (2d Cir. (N.Y.) 2005) (reproduced at Appx. A at 1a), which affirmed the decision of the district court on remand. The decision of the district court on remand, entitled Findings of Fact, Conclusions of Law, and Judgment for Plaintiff on Remand, dated December 30, 2003 was not reported (reproduced at Appx. A at 6a). The remand was directed by the United States Court of Appeals for the Second Circuit in its Summary Order, reported at 37 Fed. Appx. 19, 2002 WL 1032708 (2d Cir. (N.Y.) 2002) (reproduced at Appx. A at 15a), which Order affirmed in part, and vacated and remanded in part the district court's Findings of Fact, Conclusions of Law and Judgment for Plaintiff dated April 20, 2001, reported at 2001 WL 34088698 (E.D.N.Y. 2001) (reproduced at Appx. A at 23a).

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered on February 23, 2005. (*See* Appx. A at 1a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND DIRECTIVES INVOLVED

The statute involved is Section 207(h)(2) of the Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 207(h), which provides:

> (h) Extra compensation creditable toward overtime compensation

> **(2)** Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

as well as Subsection (e) of Section 207, which provides, in relevant part:

> (e) "Regular rate" defined
>
> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> **(5)** extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;
>
> **(6)** extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
>
> **(7)** extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regu-

> lar workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek . . .

Also involved is Section 32e03 of the DOL Field Operations Handbook (3/24/67), which provides in relevant part:

> Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hours standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compensation is provided by a premium rate of 1⅓, 1½, double, or some other multiple of the non-OT rate of pay.

In addition, 29 U.S.C. § 216, is at issue here. The statute states, in relevant part:

> § 216. Penalties
>
> (b) Damages; right of action; attorney's fees and costs; termination of right of action
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The regulations at issue include 29 C.F.R. § 778.106:

> Time of payment.
>
> There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, *see* § 778.209.

STATEMENT OF THE CASE

A. Factual Background

During the period May 1992 through December 1994, Harold Levinson Associates, Inc. ("HLA" or the "Company") employed approximately 150 employees. The employees and HLA were parties to an industry negotiated collective bargaining agreement establishing an hourly wage for each non-exempt employee. Each employee was compensated for overtime hours above 40 hours per week at the overtime rate of one and one-half times his or her regular rate.

HLA maintained payroll records for each employee that recorded the union wage rate, the number of regular hours worked, and the number of overtime hours worked. From May 1992 through September 1993, the payroll records were recorded by hand, on work schedules and daily attendance records, and HLA utilized Paychex for its payroll system (the "PCX period"). In October 1993, HLA changed to an ADP payroll system and a time clock was installed; the ADP system remained in place for the remainder of the period in issue, up to and including December 1994 (the "ADP period"). It was undisputed, and the Pre-trial Order for the initial trial provided, that the time clock installed during the ADP period accurately reflected the actual hours worked by the HLA employees during that period. The delineation of two separate periods in the overall time period at issue was an artificial one: the two periods were distinguished simply on the basis of which payroll company was used and the method used to record the number of hours worked by each employee.

Based upon the accurate hours recorded by the time clock during the ADP period and HLA's uncontested payroll records for that period, HLA paid its employees extra overtime compensation in the amount of $529,000.00 in excess of the time and a half hourly overtime wages due to its employees under the collective bargaining agreement.[1]

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[1] The payment of extra overtime compensation arose as a result of the unionization of HLA's workforce prior to the period in issue. It became apparent that the employees were likely to earn less money in overtime payments under the union contract than they had been earning previously. Accordingly, HLA's President advised the employees that the Company would pay extra overtime compensation to account for any shortfall between the overtime compensation due to the employees earned under the collective bargaining agreement and the amount of overtime payments they had earned previously.

B. Procedural Background

The Department of Labor ("DOL") commenced this action against HLA on or about May 1995 under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, alleging that HLA failed to pay overtime to its employees during the period of May 1992 through December 1994. DOL sought compensatory and liquidated damages.

The instant investigation and audit by DOL was commenced in the absence of a single complaint from any employee that they had not been fully paid for overtime hours worked.

Although DOL's theory of the case changed repeatedly during the course of the action, including DOL abandoning its original theory upon which it had commenced the action, *i.e.*, that HLA had paid no overtime wages when the facts showed that HLA had paid approximately $3 million in overtime wages during the period at issue, at trial DOL contended, among other things, that (1) as to the PCX period, HLA's hand-recorded payroll records were inaccurate and unreliable and that HLA did not pay its employees for all of the overtime that they worked during the PCX period; and (2) as to the ADP period, when, as DOL concedes, the use of the time clock resulted in an accurate accounting of the amount of overtime worked by HLA's employees, that three salaried employees were not managerial employees exempt from overtime payment and thus were due overtime wages, as well as some modest, random and diffuse discrepancies totaling eleven thousand ($11,000) dollars.

In response, HLA argued that: (1) the hand recorded records maintained during the PCX period *as well as* the time clock records kept during the ADP period were accurate; (2) it had paid all overtime wages due to its employees; (3) that during the ADP period it had paid its employees five hundred

and twenty-nine thousand ($529,000) dollars in extra overtime compensation; (4) that even if additional overtime wages were due to its employees, it is entitled to an offset of its payment of $529,000 in extra overtime compensation paid to its employees against any sums found to be due to its employees; and (5) that average overtime incurred in the ADP period was higher than in the PCX period as the Company had grown substantially in terms of sales and product volume between 1992 and 1994.

1. The Initial District Court Decision

In its decision the District Court found that HLA was liable for willfully failing to pay overtime pursuant to the FLSA. In calculating damages, the District Court adopted, in full, DOL's methodology in the calculation of overtime. DOL's methodology relied entirely upon the accuracy of the time clock records maintained by HLA during the ADP period, which DOL had stipulated correctly reflected the hours actually worked by HLA's employees during that period.

The bulk of DOL's claim for damages was for overtime wages due during the PCX period. DOL claimed, and the District Court agreed, that the Company's manual records maintained during that period were unreliable, based on DOL's dubious averaging methodology, and that, as a result, those hours had to be recreated. Based upon the non-specific testimony of former employees, which was flatly contradicted by their own concededly accurate, stipulated time records in the ADP period,[2] that they worked essentially the same amount

[2] The time records indicated that each employee's overtime fluctuated from week to week, as the Court of Appeals acknowledged (Appx. A at 20a); however, that Court did not note the incongruity between this fact and the District Court's baseless finding that HLA's employees "generally worked similar hours during these two periods." (Appx. A at 19a)

of overtime during the PCX and ADP periods, DOL recreated the amount of overtime worked during the PCX period based upon average overtime hours worked during the ADP period, as reflected in the stipulated time clock records. To obtain a weekly average, DOL took the total amount of overtime worked by the employees during the ADP period, added it together and divided by the number of weeks in that period (or the number of weeks worked by that employee, if less than the full period). This was done on an individual basis for employees who worked both during the PCX and ADP periods, and on a departmental basis for employees who worked during the PCX period but not the ADP period.[3] The ADP averages were not adjusted to reflect (1) an annual period, (2) seasonal variances in overtime work, or (3) changes in the volume of work required to be performed by each employee brought about by the almost fifty (50%) per cent growth in sales and product volume.

The weekly average of overtime derived from the ADP period was used to determine whether there was uncompensated overtime incurred during the PCX period. However, DOL did not perform the same averaging calculation for the overtime hours in the PCX period when it applied the averages derived from the ADP period. Rather, for each employee it looked at HLA's records for the PCX period on a week-by-week basis: if the compensated overtime hours for that week in the PCX period were less than the average number of overtime hours during the ADP period, DOL made a claim for the difference. All weeks in the PCX period in which

[3] DOL's calculations resulted in two figures: (1) for employees who were employed during both periods, the average number of overtime hours worked per week by each employee in the ADP period, and (2) for employees who were not employed during the ADP period, the average number of overtime hours worked per week by employees in each department.

the Company paid overtime hours above the ADP average for that employee were excluded. None of the overpayments were credited to offset any short-fall for the weeks that were below the ADP average; moreover, no effort was made by DOL to determine when the hours were actually worked for which the overtime was paid. The District Court awarded $412,326.00 in overtime payments for the PCX period.

In the ADP period, the Court found that three salaried employees were not managers excluded from payment of overtime, and thus they were awarded overtime for the ADP period, notwithstanding that the actual compensation they received as salaries exceeded the compensation they would have received as hourly employees fully paid at premium rates for all the hours they claimed to have worked. In addition, there were certain minor discrepancies in the overtime payments of employees who were paid biweekly. Accordingly, the District Court awarded $91,758.50 in overtime pay for the ADP period.

The District Court did not address HLA's argument that any liability for unpaid overtime should be offset against HLA's payment of $529,000 in extra overtime compensation to its employees. To the extent that it could be found to have considered it at all, it was only in the context of HLA's argument that it had a valid prepayment plan in place whereby it had agreed to provide its employees with a consistent weekly wage, so that its employees would not be subject to the fluctuation in income that would result from the fluctuation in the amount of overtime worked. In this regard, the District Court only found that there was no "explicit agreement" between the Company and its employees required for a valid prepayment plan. In rejecting the existence of a prepayment plan, the Court did not consider how the extra compensation paid by HLA to its employees should be credited.

2. The Decision on Appeal

On appeal, the Court of Appeals affirmed the District Court's determination as to liability and to the award of damages for the ADP time period, but found that the District Court's method of computing overtime for the PCX period lacked foundation inasmuch as its comparison of the average hours in the ADP period to the actual hours in the PCX period was improper:

> We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee work precisely the *average* number of hours worked unfairly penalizes the defendants.

(Appx. A at 19a-20a) (emphasis in original).

Defendants objected to the use of the ADP figures as a foundation for the calculation of damages in the PCX period because the two periods were not comparable: the company had grown by almost 50% between 1992 and 1994, and, further, the ADP period included two holiday seasons, rather than the one season in the PCX period. The result was an inflation in the overtime averages for the ADP period uti-

lized in establishing damages in the PCX period. The Court of Appeals acknowledged that defendants' objections to the wholesale importation of the ADP averages, without any statistical adjustment of those averages to account for the growth of the company between the PCX period and the ADP period, and without an annualizing of the figures, "is not without some force." Still, the Court of Appeals did not remand for calculation on these grounds, and as a consequence the failure to take these statistical factors into account perpetuated the harm that the Court of Appeals found in the first instance, *i.e.*, a calculation of damages that "unfairly penalizes the defendants." (Appx. A at 20a)

As noted above, the Court of Appeals recognized that when utilizing averages, the failure to apply an offset in the PCX period of any underpayment against weeks in which there was an overpayment "unfairly penalizes defendants."[4] (Appx. A at 20a) Turning to the analogous issue of whether the payment of extra compensation pursuant to 29 U.S.C. 207(h) may be offset against any liability for unpaid overtime, the Court of Appeals recognized that there is a split in authority on this issue. However, it sidestepped this issue, finding instead that "this case does not involve payments that satisfy the requirements of that provision." (Appx. A at 21a) The Court of Appeals based this determination on the unsupportable rationale that HLA's overpayment of $529,000 in extra compensation is "largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit." (Appx. A at 21a) However, the stipulation set forth in the pre-

[4] In holding that an averaging offset was required, the Court of Appeals stated that it so held not because defendants were entitled to such offset as a matter of law, but rather, because the failure to offset the under and overpayments constituted a lack of foundation for the calculation of overtime in the PCX period. (Appx. A at 21a)

trial order was simply a reflection of conceded fact entered into in order to narrow the issues to be contested.

The Court of Appeals remanded this action to the District Court for recalculation of damages during the PCX period.

3. The Trial on Remand

On remand, the District Court held a bench trial in accordance with the decision of the Court of Appeals. Defendants presented fact and expert witnesses who addressed the calculation of overtime hours worked during the course of the PCX period based upon the ADP period time clock figures to which the parties had stipulated. The defendants' witnesses testified that there is no statistical significance to the separation of the overall time period into these two sub-periods; in fact, the division of the period at issue into these two randomized subcategories creates a great risk of distortion if the figures are not adjusted statistically to account for certain factors.

Defendants' witnesses testified that in making statistical comparisons, you must use the same periods in order to arrive at a valid result. Therefore, they annualized the data, "which is a common practice" utilized by economists, but which DOL did not do, and used it as a basis from which to derive the appropriate figures for the PCX period. In addition defendants' expert looked at the demand variables, *i.e.*, the change in volume of sales from year to year and the change in the amount of product handled from year to year, which in this case was cartons of cigarettes, and concluded that consideration of the demand variables was necessary to calculate the overtime hours for the preceding years of 1992 and 1993: "because sales [and] cartons were rising over a period of time, it became clear when we started to do our analysis that the man hours worked to meet that demand must also rise." Defendants' expert then calculated the

change in sales volume in each of the three years, and the change in numbers of cartons handled in those years, to establish discount rates for the overtime required to meet the demand in those years. When the discount based upon sales volume was applied during the PCX period, there was unpaid overtime in the maximum amount of $65,000. When the discount based upon carton count was applied, there was unpaid overtime in the maximum amount of $19,000.

Defendants' expert also reviewed the monies HLA paid in overtime compensation and determined that the company had overpaid $540,000.00 and that it had underpaid $11,000.00, resulting in a net overpayment of $529,000.00 paid to the employees in extra overtime compensation. The expert testified that as an accountant adhering to generally accepted accounting principles, there was no basis for excluding an overpayment that occurred during an audit period.

4. The Decision on Remand

Defendants' expert testimony regarding the economic models and statistical analyses of the period data that should be used to obtain reasonable estimates of the actual overtime worked by the HLA employees during the PCX period, including annualizing the data from the ADP period and applying the appropriate discounts to take into account the change in the growth in the company and the increase in sales and volume over the more than 2½ year period at issue, was unrebutted by DOL. Nonetheless, the District Court rejected the expert testimony, attesting to the need to apply a coherent economic and statistical analysis to the calculations to be performed, inferring, *sua sponte* and without a shred of evidence in the record, that a 25-45% increase in sales volume would not require an increase in the hours required to perform the necessary manual labor at issue: "The court reasonably

infers that employees performing assembly, loading, and delivery tasks may well be able to handle much greater volume without an increase in their hours at work or the number of employees performing the task." Instead, the District Court again adopted plaintiff's calculations for the PCX period, which had been modified to average the PCX period overtime payments and compare them to the average overtime worked in the ADP period according to the stipulated time clock records.

The District Court also dismissed the testimony regarding HLA's $529,000 payment of extra compensation for overtime hours on the spurious grounds that the testifying expert "had little understanding of the law governing required prepayment plans" when in fact he did not offer any testimony and made no reference to prepayment plans.

5. The Appeal of the Decision on Remand

Defendants appealed the remand decision to the Court of Appeals. The Court of Appeals denied defendants' request for an offset of the $529,000 overpayment against any alleged liability owed, but did not address the merits of the issue as to whether an offset is available for extra compensation paid pursuant to 207(h); rather the Court of Appeals held, without analysis, that defendants "fail to establish that the $529,000 in question was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2)." Moreover, the Court of Appeals implausibly held that defendants' economic and statistical evidence did not rebut the "reasonableness of the formula this Court previously settled on."

REASONS FOR GRANTING THE WRIT

A. It is in the public interest that employers be encouraged to confer non-obligatory benefits that add to the economic stability of their employees, without being penalized by the imposition of bureaucratic minefields, the justification for which cannot be found in statute, regulation or DOL guideline. Thus, assuming *arguendo*, without conceding application to the instant case, that an employer fails to fully pay for every overtime hour[5], there appears to be no basis for any policy that suggests that if an employer has actually put more money in an employee's pocket for overtime than the employee is entitled to in accordance with the governing collective bargaining agreement, and documents same, that such additional money should simply get lost because it was not paid in the same time period, or that said employer should be challenged for alleged underpayments arrived at by virtue of an "averaging" process that ignores the science developed for valid averaging.

It is vital that with regard to the administration of the FLSA and the purposes that it was intended to serve that there not develop a bureaucratic approach that exalts form over substance. Such an approach benefits neither the employer who may be inhibited from such acts by concern over incurring an unintended penalty, nor the employee who loses the benefits. It is

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[5] In the instant case the employer acknowledged that every overtime hour was to be compensated at full premium rates; a single set of records was maintained accordingly, which kept a running account of the additional hours and premium payments made therefore. The records were maintained on an employee by employee basis so that an overpayment to one employee did not offset any shortfall to another; virtually all employees had received extra compensation for overtime as reflected in their individual employment records. It is not inapposite to repeat that not a single employee had ever complained that they had not been fully compensated at full premium rates for all overtime hours worked.

ironic that the employer gets a deduction for such payments and the employee pays taxes on said additional money, but the funds have no significance when determining if an underpayment has been made or additional monies are due. Rather, the object should be to encourage employers to provide for their employees to the extent that they are willing and able, while giving full credit in order to encourage such desirable acts. The employees can only benefit and the economy is the better for it.

B. The Courts of Appeals have divided on whether an employer's payment of extra compensation to its employees may be credited across work weeks or work periods to offset liability for overtime wages, or whether any extra compensation paid can only be credited against a liability that arose in the same work period. The situation at issue here is a graphic demonstration of the inequity that can result when an offset is limited to the work period in which the liability was incurred. HLA *actually* paid $529,000 in extra overtime compensation to its employees; now, assuming *arguendo*, that the Secretary's calculations are correct, HLA is being forced to pay almost the same amount a second and third time. This constitutes an enhanced penalty that is not provided by statute. Moreover, this inequity occurs in the face of the Secretary's blatant failure to address this matter and promulgate regulations that would clarify an employer's rights in this area, and in light of the divergent case law that allows an offset in certain circuits and limits it in others. Based upon the plain language of the statute and basic principles of statutory construction, there is no basis for the limitation imposed by certain courts that restricts any offset to a liability that arose in the same work period. However, due to the conflicting approaches taken by different Circuit Courts, and the resultant confusion, this matter should be determined by this Court.

Furthermore, the courts deciding this matter below have blatantly ignored this Court's directives in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), which imposes on Plaintiff the burden to "show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." This Court has not opined on what specific factors constitute "just and reasonable inference," however, the calculations performed in this action should be found to be in violation of this requirement inasmuch as they do not take into account the variety of factors that expert economists and others have found to be crucial to fairly evaluate whether and to what extent an employer, such as HLA here, is liable for unpaid overtime compensation.

POINT I

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE STATUTE ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED

A. The Plain Language of the Statute Precludes the Imposition of a Work Period Limitation For Offset of Extra Overtime Compensation Paid by an Employer

It is well-settled that an employer is entitled to an offset of extra overtime compensation paid against overtime that is owed pursuant to the FLSA. 29 U.S.C. § 207(h). This recognition is expressly incorporated into Secretary's Wage and Hours Field Operations Handbook (the "Handbook") at Section 32e03.[6] Other

[6] Section 32e03 (3/24/67) provides as follows:

Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hours standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compen-

than the provision in the Handbook, however, the Secretary has not promulgated any regulations with respect to this particular issue, despite having notice of divergent applications of this provision. *See, e.g., Herman v. Fabri Centers of America, Inc.*, 308 F.3d 580, 593 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003). Moreover, it is undisputed that neither the text of the statute, nor the provisions in the Secretary's Handbook, sets forth any work period limitation for the offset of premium payments against overtime compensation due.

In fact, the statute provides that premium payments "shall be creditable" without imposing any time limitation for the application of such credit:

> (h) Extra compensation creditable toward overtime compensation
>
> . . .
>
> (2) Extra compensation paid as described in paragraphs (5), (6) and (7) of subparagraph (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h). In construing the language of the statute to determine whether a work period limitation is applicable, it is important to note that other sections of the FLSA prescribe a workweek as the measure for compensation.

The express inclusion of such language elsewhere in the statute highlights the glaring omission of any such language in this particular section of the statute, 29 U.S.C. § 207(h). This Court has consistently held that if Congress intended that a term should apply to the provision in issue, in this case the workweek limitation for offset of overtime compensation paid, that Congress would have provided it. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002)

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sation is provided by a premium rate of 1⅓, 1½, double, or some other multiple of the non-OT rate of pay.

("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citation omitted).

This is especially true where other parts of the statute expressly include the terminology which is omitted from the section at issue here.[7] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). In this case, Congress' plain omission in this subsection of any work period limitation for the offset of premium payments made against overtime due must be interpreted to mean that Congress intended no such limitation.

Nevertheless, the question has arisen in this and other cases as to whether the offset for extra compensation may be applied only in the same work period that the overtime payments are due, or whether they may be credited across work periods to satisfy FLSA overtime obligations that arose at another time.

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[7] *See, e.g.*, Section 207 (a)(1) ("no employer shall employ any of his employees who in any *workweek* is engaged in commerce or in the production of goods for commerce ... for a *workweek* longer than forty hours ...") (emphasis supplied); Section 207 (a)(2) ("No employer shall employ any of his employees who in an *workweek* is engaged in commerce or in the production of goods for commerce ... and who in such *workweek* is brought within the purview of this subsection ...") (emphasis supplied); Section 207(b) ("No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a *workweek* in excess of that specified in such subsection ...") (emphasis supplied); Section 207(f) ("No employer shall be deemed to have violated subsection (a) of this section by employing an employee for a *workweek* in excess of the maximum *workweek* applicable to such employee ...") (emphasis supplied); Section 207(g) ("No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a *workweek* in excess of the maximum *workweek* applicable to such employee under such subsection ...") (emphasis supplied).

Two divergent lines of cases have developed that take the polar opposite positions on this issue; one line allowing an offset under the statute across work periods, and the other line finding that the statute precludes the application of any offset except in the work period in which the liability was incurred. *Compare Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580 (6th Cir. 2002) (limiting offset to the work period in which the liability arose); *Howard v. City of Springfield, Illinois*, 274 F.3d 1141 (7th Cir. 2001) (same); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324 (N.D. Ill. 2000) (same); with *Alexander v. United States*, 32 F.3d 1571 (Fed. Cir. 1994) (permitting offset across time periods); *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473 (11th Cir. 1990) (same); *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995) (same). *See also Singer v. City of Waco, Texas*, 324 F.3d 813 (5th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004) (discussing offset under FLSA for firefighters who are covered by 207(k) rather than 207(h)).

The courts that have allowed an offset of premium payments across pay periods do so based upon the plain reading of the statute. "The FLSA mandates that 'extra' compensation paid by an employer be credited toward overtime compensation due.... [T]he county should be allowed to set-off *all* previously paid overtime premiums, not just those equal to or greater than 1½ times the regular rate, against overtime compensation found to be due and owing during the damages phase of the trial." *Kohlheim v. Glynn County, Ga.*, 915 F.2d at 1481 (emphasis in original). *See also Alexander v. United States*, 32 F.3d at 1577 ("extra compensation paid as described in 29 U.S.C. § 207(e)(5)-(7) 'shall be creditable toward overtime compensation payable'" pursuant to the statute).

Furthermore, this Court has recognized that unless an action is prohibited by the FLSA, the Secretary cannot argue that an employer violated that statute. *Christensen v. Harris Cty.*,

Texas, 529 U.S. 576, 588 (2000). Because there is no prohibition in the statute against crediting premium payments across work periods, and in fact, the statute evidences a clear intent to permit an employer to offset premium payments against unpaid overtime, it cannot be a violation of the FLSA to do so.

There is an inherent inequity in failing to allow the offset across work periods when neither the statute nor the regulations require such a limitation, as the dissenting judges in *Howard* and *Fabri-Centers of America, Inc.* each recognized. In *Fabri-Centers of America, Inc.*, the dissent argued that: "It is unfair for the Secretary of Labor to force an employer to pay the additional amount of $113,313.63 when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states are allowed these premium credits." *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d at 593 (Siler, J., dissenting).[8] Similarly, in *Howard*, Judge Manion dissented to the majority's determination that the City could not offset premium payments across work periods, since "[n]either the provisions of § 207(h)(2) of the FLSA, nor its accompanying regulations, require such a limitation." *Howard*, 274 F.3d at 1149.

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[8] Judge Siler also contended that the Secretary should not be permitted to take advantage of the fact that she has failed to promulgate any regulations that may clarify this issue for employers who must conform to the terms of the FLSA.

> The Department of Labor has for more than ten years known that there was a dispute about the limitations of the premium credits but it has chosen not to attempt to promulgate regulations which would have been given some deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).... If the Secretary wishes for deference, she has the authority to promulgate regulations which can be given deference under *Chevron*.

Fabri-Centers of America, Inc., 308 F.3d at 593-94.

Moreover, the requirement that any offset be limited to a work period restriction is called into question by the regulation promulgated by the Secretary addressing when overtime is required to be paid, 29 C.F.R. § 778.106. In § 778.106, the Secretary notes that: "There is no requirement in the Act that overtime compensation be paid weekly. . . . When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable." This express recognition that overtime may be paid across work periods when necessary lends further support to the determination that the offset provision set forth in § 207(h) is not restricted to the work period in which the liability arose and the failure to credit extra compensation across work periods is an enhanced penalty that is not authorized by statute.

B. A Failure to Credit Extra Overtime Compensation Constitutes An Enhanced Penalty That Is Not Recognized or Authorized By Statute

The FLSA is "designed to compensate the aggrieved employee, not punish the offending employer." *Lanza v. Sugarland Run Homeowners Assoc., Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000). Thus, all of the enumerated remedies itemized in § 216(b), 29 U.S.C. § 216(b), which sets forth the damages that may be assessed against an employer that is found to be in violation of the overtime provisions of the FLSA, "are compensatory in nature, designed 'to put the [employee] in the place she would have been absent the employer's misconduct.'" *Lanza*, 97 F. Supp. 2d at 740 (citing *Snapp v. Unlimited Concepts*, 208 F.3d 928, 934 (11th Cir. 2000)[9],

[9] *Snapp* and *Lanza* are instructive as well in the construction of the FLSA. In analyzing § 216(b) for the purpose of determining whether puni-

cert. denied, 532 U.S. 975 (2001)). To prohibit the offset of premium payments previously made by an employer is, in essence, an enhanced penalty punishing the employer, which is not provided by statute. 29 U.S.C. § 216(b). It is also manifest that full payment for overtime hours worked, and actually received by the employees prior to the commencement of any claim or litigation to compel such payments, exhausts the Secretary's authority to compel additional payments for the same hours worked. To hold otherwise would result in an anomaly whereby an employer who pays for more overtime hours than it is obliged to can, as here, find itself liable under the FLSA for failure to pay and then be required to pay the same amount a third time on the basis of "willfulness" for failure to pay the amount it has actually paid. It is respectfully submitted that no statute, especially one that at best is silent, can be interpreted to include a technical minefield that leads to such a result.

C. The Work Period Limitation Is Particularly Inappropriate Here Where The Measure Of Damages Is Averaged Across Multiple Work Periods

The determination that premium payments may be credited only to a work period where overtime is owed is particularly inapposite here. In this case, the Secretary claimed, and the Court agreed, that it was necessary to recalculate the overtime hours HLA's employees allegedly worked during the PCX period versus the amount of overtime compensation they received. To do so, the Secretary urged the use of an averaging methodology; that methodology did not take into account any changes over time in the amount of overtime worked, the growth in the size of the company or the increased volume of business or sales. Thus, she

tive damages are available under that provision, those courts held that the inclusion of punitive provisions in other parts of the statute cannot be imported into this section, since this section does not include such language and clearly intends to provides compensatory remedies only.

used the average amount of overtime worked each week during the ADP period for each employee, if he or she was employed during the PCX period, or for each department, for employees who were not employed during the PCX period, to calculate the amount of overtime claimed to be owed to employees in the PCX period. The district court adopted the Secretary's averaging methodology and applied it to determine the amount of overtime allegedly due to HLA's employees. The Second Circuit agreed, in part, that the Secretary could utilize averages derived from the ADP period to "stand in" for the amount of overtime worked during the PCX period, due to the lack of foundation for the "actual" hours of overtime worked by the employees.

Thus, the calculation of overtime figures for the PCX period does not compensate employees for the actual hours they worked, but is an estimate based upon averages derived from another work period. In order to assess damages, therefore, it is equally appropriate to credit overpayments across work periods, where, as here, estimates of unpaid overtime due is based upon averages (for overtime hours worked) applied across work periods. Thus, HLA is entitled to an offset of premium payments made during the ADP period to damages assessed during the ADP and PCX periods, which together make up the totality of the period under audit.

D. The Court Cannot Disregard The Stipulation Entered Into by the Parties

It was improper for the Courts below to disregard or discount the effect of the stipulation that the Secretary entered into with HLA, whereby it agreed that HLA had paid extra overtime compensation of $529,000 to its employees in excess of the monies due under the collective bargaining agreement for the overtime hours that they had worked. The courts may not ignore that stipulation.[10]

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[10] The Second Circuit rejected HLA's offset application solely on the basis that the calculation was derived from the stipulation between the parties: "The

There is no dispute that HLA paid $529,000.00 in excess premium overtime wages during the ADP period. DOL stipulated, as set forth in the pretrial order, that the time-clock records were accurate and has never disputed that HLA paid these monies to its employees.[11] The stipulation was entered into as part of the process to narrow the issues for trial. Moreover, the DOL needed this stipulation to create a platform from which to launch their averaging gymnastics. Thus DOL's subsequent attempt to evade the effect of this stipulation as it applies to HLA, claiming that the stipulation was "only for the purpose of trial," is of no effect, especially since DOL expressly relies on the accuracy of those records to recreate the amounts allegedly due during the PCX period.

Pretrial stipulations are entered into explicitly "for the purpose of trial." The courts have recognized that it is an "elementary principle of trial practice that once a fact has been agreed to by both parties and, as a result of such agreement has been submitted to the trial court as a proposed finding of fact, it need not be proved at trial. . . . *The purpose of a pre-trial stipulation of this sort is precisely to narrow the scope of trial by eliminating issues that the parties do not dispute.*" *Zuchowicz v. United States*, 140 F.3d 381, 392 (2d Cir. 1998) (emphasis supplied).

Courts encourage parties to enter into stipulations of fact in order to narrow the issues for trial and conserve judicial resources. *Zuchowicz*, 140 F.3d at 392. The stipulating party, who would otherwise submit evidence to prove that fact, relies on the stipulation and foregoes the opportunity to submit evidence

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purported 'overpayments' are largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit." (Appx. A at 21a)

[11] At the trial on remand, DOL disputed the inclusion of certain small sums of money in the overall figure. However, these amounts are *de minimus* and do not affect HLA's right to offset these monies against any damage amounts assessed by the courts below.

to the trier of fact. For that reason, it has been consistently held that courts may not disregard stipulations of fact, which are binding on the court as well as the parties. *See, e.g., Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) (vacating District Court's finding of fact that contradicted stipulation, holding that "[s]tipulations voluntarily entered into by the parties are binding, both on the District Court and on [the Court of Appeals].").[12]

HLA relied upon the stipulation that it entered into with the Secretary. For the Courts below to ignore that stipulation, and thereby deprive HLA of the opportunity to submit evidence on this matter, would be a manifest injustice. Moreover, it defies credulity to suggest that entering into a stipulation as to that which is concededly true and upon which a defendant based its entire defense can somehow work to the detriment of that party, by denying it the benefits of that stipulated truth. Accordingly, the Courts below were bound by and were required to decide the issues in accordance with the terms of the Stipulation.

POINT II

THE COURTS BELOW HAVE BLATANTLY IGNORED THIS COURT'S DIRECTIVE TO CALCULATE UNPAID OVERTIME AS A MATTER OF JUST AND REASONABLE INFERENCE

This Court has held that plaintiff bears the burden to "show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687. In this instance however, the method chosen by DOL to calculate the amount of allegedly uncompensated work, which was wholly

[12] The Secretary stipulated that the time clock figures for the ADP period were accurate. The Secretary's subsequent adoption of the district court's statements to the contrary is without effect.

endorsed by the district court on remand and affirmed on appeal, has egregiously ignored the direction of this Court and cannot be found to be the result of "just and reasonable inference."

On the first appeal, the Court of Appeals recognized that the methodology urged by the Secretary and utilized by the district court "unfairly penalizes the defendants" (Appx. A at 21a) because it did not utilize a coherent mathematical analysis and therefore noted that the Secretary's "actual computations of weekly hours for the PCX period" suffered from a "lack of foundation." (Appx. A at 21a n.3)

The Secretary's recalculation on remand, and the adoption of such recalculation by the district court and the Court of Appeals, ignored both of the concerns initially expressed by the Court of Appeals and the requirements of this Court: (1) that the Secretary utilize a methodology that does not unfairly penalize defendants; and (2) that the Secretary establish a proper foundation for its computations of weekly hours for the PCX period.

Instead, as HLA submitted on remand, basic statistical and economic analyses of the ADP period figures were required so that their application to the PCX period would be statistically valid for foundational purposes. Principally, HLA's evidence established, as a matter of statistical and economic analysis, that in order to accurately utilize the ADP figures to derive the "average" overtime figures for the PCX period, the information must be broken down into annual periods, and further that changes over time of the workload being performed had to be factored into the determination.

This evidence established that the Secretary's mechanical and unfounded calculations were not reasonable and did not provide the proper foundation that the Court of Appeals ini-

tially found lacking. Rather, as HLA demonstrated, in order to make a reasonable comparison sufficient to fairly apply the ADP figures to the PCX period in accordance with the direction of the Court of Appeals and this Court's rulings, it was necessary to: (1) equalize the time periods being compared, *i.e.*, compare annual figures to each other, and (2) adjust the figures to account for the changes in the variables that affected the amount of work required to be performed and therefore the amount of overtime that was necessary to complete that work. As a result of this analysis, HLA effectively satisfied its burden to rebut the Secretary's calculations "with evidence to negative the reasonableness of the inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687-88.

It is only after the information regarding overtime hours worked is annualized, that it is then possible to determine the average amount of overtime worked by an individual employee on a weekly basis for the year. As HLA's expert testified, annualizing this information helps "smooth out" seasonal variations, such as increased sales and volume in the period between Thanksgiving and the New Year, and avoids the risk of distortion. Moreover, once the information is annualized, other information regarding the company, such as changes in the volume of sales and the quantity of product sold, can be applied to these figures to appropriately adjust them to account for such changes so that a valid comparison can be made.

Defendants' experts performed this necessary analysis and determined the adjustments to the calculated average amount of overtime required to account for the increase in the amount of product being handled and the volume of sales from 1992 through 1994. The benchmark was the amount of overtime worked in 1994, since the parties had stipulated that the time clock records were accurate. The experts then looked at the

change in sales volume between 1994 and 1993 as well as between 1994 and 1992 and determined a percentage of discount to the amount of overtime hours that it would take to perform the work for a lesser volume of business. In a secondary check on these figures, the experts compared the change in the number of cartons of cigarettes sold. The change in this figure was similar to the change in sales volume over the period of time in issue and resulted in similar discount percentages; it is undeniably reliable.

The number of cartons of cigarettes sold was 9,400,000 for 1992, 10,700,000 for 1993 and 13,829,000 for 1994. The percentage change was 40% from 1992 to 1994 and 23% from 1993 to 1994. When applied to calculate overtime during the PCX period, the maximum amount of uncompensated overtime is $65,000. The change in sales volume was similarly significant. In 1992, the amount of the company's sales (in rounded figures) was $192,000,000.00; in 1993 it was $219,000,000.00 and in 1994, it was $270,000,000.00. Expressed in terms of percentages, there was a 47% change between 1992 and 1994 and a 29% change between 1993 and 1994. When applied to calculate overtime during the PCX period, the maximum amount of uncompensated overtime is $19,000.

The district court's determination, without any testimony to support it, that a change of this magnitude in the sales and volume of business would not require any additional time to accomplish the consequent work is without merit and does not constitute a "just and reasonable inference" as required by this Court for such a determination. The only equitable method to determine what amounts, if any, are to be assessed as damages must utilize accepted economic and statistical principles in any calculation of the overtime hours worked: using annualized figures and taking into account the growth in the sales and volume over the period in issue.

Accordingly, defendants' maximum liability for the PCX period is between $19,000 and $65,000.

Accordingly, the Secretary's calculations, adopted by the district court and affirmed by the Court of Appeals, do not reasonably reflect the average amount of overtime worked by HLA's employees during the PCX period. Therefore, the district court's determination, affirmed by the Court of Appeals, is in conflict with this Court's rulings: a calculation made without any basis in statistical or economic rationality cannot be found to constitute "just and reasonable inference."

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the petition for writ of certiorari should be granted.

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New York, New York

Respectfully submitted,

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